

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

JUL 26 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

KONDAUR CAPITAL CORPORATION,)
a Delaware corporation,)

Plaintiff/Appellant,)

v.)

PINAL COUNTY, a political subdivision)
of the State of Arizona; and PAUL R.)
BABEU, Sheriff of Pinal County,)

Defendants/Appellees.)

2 CA-CV 2012-0004
DEPARTMENT A

MEMORANDUM DECISION

Not for Publication
Rule 28, Rules of Civil
Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV201002012

Honorable Robert Carter Olson, Judge

APPEAL DISMISSED

Miles, Bauer, Bergstrom & Winters, LLP
By Jeremy T. Bergstrom

Henderson, Nevada
Attorneys for Plaintiff/Appellant

Elardo, Bragg, Appel & Rossi, P.C.
By Marc A. Appel

Phoenix
Attorneys for Defendants/Appellees

E C K E R S T R O M, Presiding Judge.

¶1 Appellant Kondaur Capital Corporation appeals from the trial court’s grant of summary judgment and entry of declaratory judgment on issues relating to the execution of writs of restitution in forcible detainer proceedings as carried out by appellees Pinal County and Sheriff Paul Babeu.¹ Because the ruling Kondaur challenges is not a final, appealable order, we dismiss for lack of jurisdiction.

Factual and Procedural Background

¶2 Kondaur purchased a residential property in March 2010, and, in May, filed a complaint for forcible detainer against the property’s occupants, Clinton and Catherine White.² On May 28, the trial court found the Whites guilty of forcible detainer and ordered them to vacate the premises. The court further ordered that if the Whites “fail[ed] or refuse[d] to vacate according to this order, [Kondaur would] be entitled to the issuance of a Writ for Restitution of the aforementioned premises no sooner than June 3, 2010.” However, the Whites did not vacate the property at that time, and Kondaur obtained a writ of restitution against them in order to have the Pinal County Sheriff’s Office (PCSO) evict the Whites from the premises. PCSO was presented with the writ in July and again in November 2010.

¶3 In January 2011, claiming PCSO had “refused to lock-out Defendants Whites from the Subject Property and return [it] to Plaintiff Kondaur,” Kondaur sought enforcement of the May 2010 judgment and the writ of restitution by filing an “amended

¹Babeu is the sheriff and head of the Pinal County Sheriff’s Office (PCSO). Because PCSO therefore carries out Babeu’s orders, we describe the appellees in this case as PCSO whenever it is practical to do so.

²The Whites have not appeared in this appeal.

complaint” in the same cause number. The amended complaint included a claim for unjust enrichment against the Whites and sought declaratory relief and an injunction against Pinal County and Sheriff Babeu.³ In a separate pleading filed on the same date as the amended complaint, Kondaur petitioned the trial court for a writ of mandamus directing Babeu to enforce the writ of restitution.

¶4 Kondaur moved for summary judgment in April 2011 on the following issues: whether, under A.R.S. § 12-1178(C), PCSO must enforce a writ of restitution by the end of the following business day after receiving it, absent exigent circumstances; and whether, under A.R.S. § 33-1368(E), a landlord is under no duty to provide moving assistance to an occupant during an eviction action. In a joint stipulated statement of facts, the parties agreed the trial court should enter declaratory judgment regardless of whether the Whites were evicted during the proceedings. The parties also “stipulate[d]” that the claims would “not be rendered moot by such an eviction.” Moreover, they agreed that Kondaur’s other claims would “remain in abeyance” until the court ruled on the motion for summary judgment.

¶5 By July 2011, when the Whites still had not vacated the property, Kondaur “supplement[ed]” its motion for summary judgment, asking for declaratory relief on these

³A review of the rules and statutes governing eviction actions suggests the trial court had no authority to decide these issues in a detainer proceeding in which a judgment already had been entered. *See* A.R.S. § 12-1177(A) (“[T]he only issue [in a forcible detainer action] shall be the right of actual possession”); Ariz. R. P. Eviction Actions 2 (“All eviction actions are statutory summary proceedings and the statutes establishing them govern their scope and procedure.”); Ariz. R. P. Eviction Actions 8(c) (eviction actions cannot be consolidated with other types of civil actions). But because we lack jurisdiction over the appeal, we need not decide that issue.

additional issues: whether, “absent judicial intervention, the sheriff’s department must execute on a writ of restitution and evict the occupants from the subject property”; whether a writ of restitution expires once it has been properly issued; whether a writ ever has to be reissued; and whether an occupant may remain in a property for longer than five days after a writ of restitution has been served. At the hearing on the motion for summary judgment in August, Kondaur affirmed that it was “seeking declaratory judgment not so much for this case, as much as to have guidance for how the sheriff’s office should be functioning in future cases.” The Whites apparently had been locked out of the property in late July.

¶6 In its December 2011 judgment, the trial court found there was a justiciable issue for declaratory relief “based on existing facts and circumstances that continue to arise between the parties, sparse legal precedent, and an existing need for a declaration of certain rights and legal relations between the parties.” It granted summary judgment on the issues, some in favor of Kondaur and some in favor of PCSO, and “declare[d] the rights, duties and obligations of the parties under law,” thoroughly setting forth its reasoning as to each issue.

¶7 Kondaur filed a timely appeal, asking this court to “overturn the Superior Court’s opinion on these issues to the extent they were contrary to the position of Kondaur.” We have jurisdiction to review final declaratory judgments pursuant to A.R.S. §§ 12-1837 and 12-2101(A)(1).⁴ But we also have a duty to review our jurisdiction, and,

⁴The court’s signed minute entry erroneously designated the cause number as S1100CR201002012. We have corrected the number in our caption as Cause No.

if it is lacking, to dismiss the appeal. *Sorensen v. Farmers Ins. Co. of Ariz.*, 191 Ariz. 464, 465, 466, 957 P.2d 1007, 1008, 1009 (App. 1997).

¶8 Although the trial court’s judgment states “that this matter is concluded and fully adjudicated by this final judgment,” the court never ruled on Kondaur’s unjust enrichment claim against the Whites. Indeed, the parties stipulated that claim would survive until after the court ruled on the claim for declaratory relief. Therefore, the declaratory judgment here is not a final judgment because it left at least one claim remaining, and it contained no express language of finality as required by Rule 54(b), Ariz. R. Civ. P. See *Maria v. Najera*, 222 Ariz. 306, ¶ 6, 214 P.3d 394, 395 (App. 2009); *Pulaski v. Perkins*, 127 Ariz. 216, 217, 619 P.2d 488, 489 (App. 1980). Accordingly, we dismiss the appeal.

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Judge

CV201002012, consistent with the pleadings. See Pinal Cnty. Super. Ct. Loc. R. P. 1.2(a), 2.1(a).